

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Regulatory Policies to)	IB Docket No. 96-111
Allow Non-U.S.-Licensed Space Stations to Provide)	
Domestic and International satellite Service in the United)	
States)	
)	
and)	
)	
Amendment of Section 25.131 of the Commission's)	CC Docket No. 93-23
Rules and Regulations to eliminate the Licensing)	RM-7931
requirement for Certain International Receive-Only Earth)	
Stations)	
)	
and)	
)	
COMMUNICATIONS SATELLITE CORPORATION)	File No. ISP-92-007
Request for Waiver of Section 25.131(j)(1) of the)	
Commission's Rules As It Applies to Services Provided)	
via the INTELSAT K Satellite)	

COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its Comments in response to the Further Notice of Proposed Rulemaking, FCC 97-252, released July 18, 1997 in the above-captioned dockets ("Further Notice"), concerning the Commission's proposed framework to allow satellites licensed by other countries to provide service in the United States. The Further Notice asks for comment on the extent to which the Commission's DISCO II proposals to examine effective competitive opportunities for satellites should be changed in light of the World Trade Organization Agreement on Basic Telecommunications Services ("WTO agreement").

044

The Commission proposes (§ 13) , inter alia, to grant applications to serve the United States using satellite systems licensed by WTO Member countries under "a presumption that we can rely on competitive market forces to enhance competition in satellite services" unless an opposing party demonstrates that there would be "a very high risk to competition in the United States satellite market that could not be addressed by conditions that we could impose on the authorization."

AT&T notes that, as described in its Comments in the *Foreign Participation Rulemaking*,¹ which are attached hereto, neither the "very high risk of harm to competition" standard nor the proposed presumption "of enhanced competition" (§ 13) are necessary to meet WTO requirements. As demonstrated therein, the General Agreement on Trade in Services ("GATS") does not require any particular showing of competitive harm.² Similarly, the GATS

¹ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, File No. IB 97-142, Comments of AT&T (filed July 9, 1997), at 20-24.

² *Id.* at 20-21.

would allow the use of the neutral evidentiary standard that the Commission proposes to use in considering other public interest factors, *see* NPRM, ¶ 37, in evaluating the impact on competition.³

Respectfully submitted,

AT&T CORP.

By: /s/ James J.R. Talbot
Mark C. Rosenblum
Lawrence J. Lafaro
James J. R. Talbot

Its Attorneys

Room 3252H3
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-8023

Dated: August 21, 1997

³ *Id.* at 22-24.

would allow the use of the neutral evidentiary standard that the Commission proposes to use in considering other public interest factors, *see* NPRM, ¶ 37, in evaluating the impact on competition.³

Respectfully submitted,

AT&T CORP.

By:



Mark C. Rosenblum

Lawrence J. Lafaro

James J. R. Talbot

Its Attorneys

Room 3252H3

295 North Maple Avenue

Basking Ridge, New Jersey 07920

(908) 221-8023

Dated: August 21, 1997

³ *Id.* at 22-24.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Policies on Foreign Participation)	
in the U.S. Telecommunications Market)	File No. IB 97-142

COMMENTS

Mark C. Rosenblum
Lawrence J. Lafaro
James J. R. Talbot

295 N. Maple Avenue
Room 3252H3
Basking Ridge, NJ 07920
(908) 221-8023

Dated: July 9, 1997

Table of Contents

SUMMARY	i
I. FOREIGN PARTICIPATION IN THE U.S. TELECOMMUNICATIONS MARKET REQUIRES EFFECTIVE SAFEGUARDS AGAINST COMPETITIVE HARM.....	1
1. Commitments To Open Markets in the Future Provide No Basis for Altering the Public Interest Standard	3
2. The Commission Should Not Relax Standards and Establish a Pro-Authorization Presumption Based on Commitments Not Meeting ECO Requirements.....	7
3. There is Also no Basis on Which to Relax Standards for those Nations That Have Refused to Commit to Granting Access to their International Services Markets	11
II. THE WTO AGREEMENTS ALLOW THE COMMISSION TO PROMOTE COMPETITION BY DENYING LICENSES WHERE NECESSARY AND REQUIRE NEITHER A SHOWING OF "A VERY HIGH RISK" OF HARM NOR PRESUMPTIONS IN FAVOR OF ENTRY AND ACCOUNTING RATE FLEXIBILITY	12
1. The WTO Agreement Does Not Affect the Commission's Ability and Obligation to Protect the U.S. Market Against Competitive Harm.....	14
2. License Denial is Permissible to Prevent Competitive Harm that Could Not be Addressed by Other Safeguards.....	16
3. The GATS Does Not Require a Showing of "a Very High Risk of Harm" to Competition	20
4. There Should be no Presumption in Favor of Section 214 Approval or Accounting Rate Flexibility	22
III. FACILITIES-BASED AND RESALE ENTRY SHOULD BE CONDITIONED ON COST-BASED ACCOUNTING RATES.....	24
1. Foreign Carrier Provision of U.S.-Outbound Facilities-Based or Switched Resale Services Should require Cost-Based Settlement Rates	25

2.	The Requirement For Cost-based Settlement Rates Should Also Apply to the Provision of U.S. Outbound Services Through Switched Resale.....	31
IV.	THE PREVENTION OF 'ONE-WAY' BY-PASS REQUIRES COST-BASED SETTLEMENT RATES OR THE REGULATION OF SWITCHED SERVICES PROVIDED OVER INTERNATIONAL PRIVATE LINES UNDER ACCOUNTING RATE FLEXIBILITY RULES.....	33
1.	The Safeguards Proposed by the NPRM Would Not Provide Adequate Protection Against 'One-way' By-Pass	37
2.	The Commission Should Prevent By-Pass by Requiring a Cost-Based Settlement Rate, or by Adopting a Similar Approach to That Proposed for Accounting rate flexibility Arrangements.....	40
V.	OTHER STRONGER POST-ENTRY REGULATORY SAFEGUARDS ARE ALSO REQUIRED	43
1.	A Clear 'No Special Concessions' Requirement is Required	47
2.	The Proposed Basic Dominant Carrier Safeguards Should be Strengthened.....	45
3.	Additional Supplemental Dominant Carrier Safeguards Are Also Required.....	48
4.	Improved Filing Procedures Are Required.....	52
VI.	MARKET CONDITIONS ARE INSUFFICIENTLY COMPETITIVE TO WARRANT ANY PRESUMPTION IN FAVOR OF ACCOUNTING RATE FLEXIBILITY	53
1.	The Commission Should Apply a Neutral Presumption for WTO Member Countries With the Burden of Production on the Proponent.....	54
2.	The Relevant WTO Commitments Should Meet the Requirements of the ECO Test.....	56
	CONCLUSION	58

SUMMARY

With this NPRM, the Commission proposes broad and far-reaching changes in its regulation of U.S. international services. The effective competitive opportunities ("ECO") test, established less than two years ago to prevent competitive harm in the U.S. market from the leveraging of foreign market power, would be removed for Section 214 authorizations, Section 310(b) applications, and Submarine Cable Act applications by carriers from all 130 Member countries of the World Trade Organization ("WTO"). Section 214 authorizations by carriers from these countries would henceforth be presumed to be in the public interest, rebuttable only by a showing that a grant would pose "a very high risk" to competition that post-entry safeguards could not address. Submarine Cable Act applications by such carriers would be routinely granted unless a similar showing was made. The equivalency test preventing the 'one-way' inbound by-pass of settlement rates would likewise be removed for these countries, and flexible agreements would be presumed lawful. Existing post-entry dominant carrier regulation of foreign carriers also would be reduced.

The NPRM proposes these changes in response to the recent WTO Agreement on Basic Telecommunications. The NPRM states that WTO commitments by 69 countries to allow competition by foreign suppliers and by 65 countries to enforce fair rules of competition will bring about fundamental changes in the global market that allow entry rules in the U.S. international market to become similar to those in the U.S. domestic market. According to the NPRM, the Commission's goal in establishing the ECO test of promoting effective competition in the U.S. market has been "substantially achieve[d]" by

the WTO agreement, and the test may therefore be removed for all WTO Member countries.

AT&T welcomes the WTO agreement as a major landmark in the development of a competitive global telecommunications market. A substantial number of countries have committed to open their markets in varying degrees both by removing legal barriers to entry and by establishing rules to ensure that other countries' carriers may compete on fair and equal terms. The agreement promises to benefit consumers through lower prices and new service options, while providing many new opportunities for carriers.

Because many of the beneficial effects of the WTO agreement will not be felt for some time, the potential abuse of foreign market power must nonetheless remain a major Commission concern. Competition has taken many years to develop in the U.S. and will also take some time to develop in other countries. The WTO agreement does not become effective until January 1, 1998 and in most countries the implementation process is still far from complete. Indeed, the commitments of a number of countries do not become effective until much later than 1998. It is therefore premature to conclude that the Commission may henceforth rely on the competitive marketplace and relax existing entry standards.

Indeed, on January 1, 1998, less than one fifth of WTO Member countries would qualify as fully open under the Commission's existing rules to prevent the leveraging of foreign market power. Thus, in many WTO Member countries, international services will continue to be the monopoly of the incumbent, frequently government-owned carrier. In others, including Canada and Mexico, the two largest U.S. international traffic

routes, there will still be significant limitations on competition. Indeed, the foreign market conditions that led the Commission in 1995 to find that a careful pre-entry evaluation of potential anticompetitive conduct by foreign carriers with market power was necessary to protect the U.S. public interest will, in large part, remain in place for some years after 1998, notwithstanding the WTO agreement.

The NPRM recognizes the importance of ensuring that anticompetitive abuse does not occur and emphasizes the Commission's intent to deny licenses where post-entry safeguards would not do so. But in other respects, the NPRM would go too far in relaxing standards and entry procedures that will still be required, at least for now, to ensure that competitive harm does not occur in the U.S. market. The NPRM repudiates neither the concerns nor the analysis that led to the establishment of the ECO test -- notably, the ineffectiveness of post-entry safeguards -- and even reaffirms the validity of this analysis by proposing to continue the ECO test for non-WTO countries. Yet it would establish a presumption in favor of the entry to the U.S. market of carriers from all 130 WTO Member countries rebuttable only on a showing of "a very high level" of risk to competition. The Commission has not shown an adequate basis for these changes in existing practices.

The NPRM also cites the need for consistency with the multilateral rules of the WTO. In the past, the U.S. has not made broad changes in regulatory rules in response to new trade agreements unless it has been clear that they have been strictly required. No such clarity is evident here, where GATS rules do not require the NPRM's proposed high threshold of harm or its presumptions in favor of entry and flexible accounting rate arrangements. Moreover, license denial to prevent competitive harm that

cannot be addressed by safeguards is consistent with multilateral rules. As both the Commission and the Department of Justice have previously found, license denial is necessary to prevent competitive harm from the leveraging of foreign market power.

AT&T strongly supports the Commission's initiative to establish new benchmark settlement rates at levels that are closer to the underlying costs of terminating international traffic. AT&T also supports the Commission's proposed use of settlement rates to address market entry on affiliate routes. However, the use of high-end benchmark settlement rate safeguards to address facilities-based entry and the provision of switched services over international private lines, as currently proposed, would not sufficiently mitigate the resulting competitive harm in the U.S. market. If only high-end benchmark rates are required, pre-entry analysis of competitive conditions in the foreign market and license denial would continue to be necessary (but with a modified analysis to focus on the market power of the applicant). Otherwise, the ability to leverage above-cost settlement rates through price squeezes and one-way settlement rate by-pass would remain, providing the incentive to capture excess settlement subsidies in order to raise rivals' costs or to fund anticompetitive strategies in the U.S. market.

However, as shown herein and in the accompanying affidavit of Dr. William H. Lehr, a requirement for cost-based settlement rates (i.e., at the low end of the proposed benchmark ranges) for all types of switched services, including outbound switched resale, would significantly lower the potential risks to competition. The Commission should, in particular, apply a cost-based settlement rate safeguard to switched resale services. As Dr. Lehr concludes, "the mode of entry does not affect the attractiveness of executing the price squeeze strategy" and resale entry even has many

advantages over facilities-based entry -- especially if no settlement rate safeguard is applicable.

A requirement for cost-based settlement rates, together with strengthened post-entry safeguards, would thus greatly reduce the potential harm to competition from the new entry rules proposed by the NPRM. Unless the Commission adopts such requirements, it should continue to deny licenses for any carrier, including those from WTO Member countries, where conditions of competition in the foreign country are not yet sufficient to preclude the leveraging of foreign market power.

Strengthened post-entry safeguards are also important to prevent other anticompetitive conduct and should include requirements for the disclosure of all affiliate transactions, structural separation and an accelerated complaint procedure as part of the supplemental dominant carrier rules. The supplemental rules should apply to the U.S. affiliates of carriers with market power in foreign markets unless the destination country has authorized multiple facilities-based competitors, does not prohibit non-nationals from controlling such carriers, and has implemented the requirements of the WTO Reference Paper. Finally, the Commission should apply a neutral presumption to flexible accounting rate arrangements, with the burden of production on the proponent of the arrangement.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Policies on Foreign Participation)	
in the U.S. Telecommunications Market)	File No. IB 97-142

COMMENTS

AT&T Corp. ("AT&T") hereby submits its Comments in response to the Order and Notice of Proposed Rulemaking¹ concerning the Commission's proposed revision of its rules governing foreign carrier entry to, and participation in, the U.S. telecommunications market.

I. FOREIGN PARTICIPATION IN THE U.S. TELECOMMUNICATIONS MARKET REQUIRES EFFECTIVE SAFEGUARDS AGAINST COMPETITIVE HARM.

Although proposing (§§ 55, 65, 77) to continue the effective competitive opportunities ("ECO") and equivalency tests for non-WTO Member countries, the NPRM (§§ 32, 50, 62, 68) would eliminate these requirements for all Members of the WTO. The primary basis for this proposal is the NPRM's tentative conclusion (§ 29) that the WTO commitments made in the basic telecommunications negotiations "substantially achieve"

¹ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, (released June 4, 1997), FCC 97-195 ("NPRM").

the *Foreign Carrier Entry Order* goal of promoting effective competition in the U.S. market. The NPRM (§ 31) anticipates that "countries representing over 95 percent of the world's telecommunications revenues will be open to competition by U.S. carriers" and "most foreign carriers with monopoly positions today should have far less market power." A critical assumption underlying the NPRM, therefore, is that WTO commitments and disciplines now provide sufficient competition in the U.S. international services market to warrant reliance on other regulatory approaches to redress anticompetitive conduct.

The WTO agreement does indeed promise major changes in the global telecommunications industry that will increase competition, reduce the market power of incumbent carriers, and bring lower prices and new and innovative services for consumers and new market opportunities for U.S. carriers. However, the WTO agreement will not immediately result in the creation of open, competitive markets in all WTO countries or the removal of the market power of incumbent carriers. Just as competition took many years to have this effect in the United States, so it will take time for competition to develop in other countries as they open their markets and implement the new laws and regulations that comprise the first step towards developing competitive markets.

While 68 countries did commit to varying degrees of market liberalization in the WTO negotiations, the agreement does not become effective until January 1, 1998 and in most countries the implementation process is not yet complete. Indeed, the commitments of a number of countries do not become effective until much later than 1998. At this early stage, it therefore appears premature to conclude that Commission may relax the standard and procedures for entry into the U.S. international services market and henceforth rely on "competitive market forces rather than [the] ECO test as a means

of achieving the maximum benefits for U.S. consumers." NPRM, ¶ 33. The mere prospect that these countries may have open markets in the future is an insufficient basis for such a major change in existing procedures.

As further evidence that existing safeguards should not be removed at this early stage, only the commitments made by 20 countries would, if implemented, meet the requirements of the ECO test for facilities-based entry to the U.S. market on January 1, 1998. Similarly, only 25 countries would meet equivalency requirements on January 1, 1998 on the basis of their WTO commitments. Additionally, the extent to which many new commitments will be forthcoming from the "approximately 60" WTO Member countries (NPRM, ¶ 35) that have not made market access commitments is unclear, as such countries would thereby be deprived of the considerable benefits of their "free-rider" status. As the conditions of competition the Commission has found necessary to preclude the leveraging of foreign market power are likely to exist only in a relatively small number of WTO Member countries in the near future, there is no present basis to change existing entry procedures.

1. Commitments to Open Markets in the Future Provide No Basis for Altering the Public Interest Standard.

The Commission proposes (¶ 32) that all Section 214 entry applications from WTO Member countries be presumptively authorized unless it is shown that the application poses "a very high risk to competition."² As the Commission concluded only

² The present standard for judging applications is whether they pose a "substantial risk to competition." *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3876, 3915, 3961, 3967, 3969. This standard reflects a similar test found in antitrust law that the

two years ago, a careful evaluation of the potential anticompetitive conduct by a foreign carrier with market power is necessary to protect the U.S. public interest:

We disagree with [the] assertion that safeguards, absent open competition in foreign markets, can adequately promote an effectively competitive market for the provision of U.S. international services. Competitive safeguards can be used to prevent carriers with market power from leveraging that market power into an adjacent competitive market to the disadvantage of competition and, ultimately consumers. We are not, however, convinced that our regulatory safeguards, standing alone, are the optimal way to ensure that entry, particularly facilities-based entry, by a foreign carrier on routes where it has bottleneck control will preserve and promote competition in the U.S. international services market. Effective competition in such circumstances depends upon the ability of U.S. carriers to participate in a competitive market on the foreign end. If there is no opportunity for U.S. participation in competitive markets abroad, then the benefits of providing international service on an end-to-end basis will flow solely to a dominant foreign carrier and its U.S. affiliate. *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3880.

(footnote continued from previous page)

Commission is bound to consider. Section 7 of the Clayton Act prohibits acquisitions when "the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18, *quoted in* NPRM ¶ 42. The Commission recognizes that it has a statutory obligation to analyze potential anticompetitive effects that is only "discharged . . . when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors." *Id.* (quoting *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980)(en banc). The "substantial risk of anticompetitive effects" standard predates the *Foreign Carrier Entry Order*. See e.g., *In re Domtel Communications, Inc.*, 10 FCC Rcd. 12159, 12161 (1995) ("properly conditioned, grant of Domtel's application will not present a substantial risk of anticompetitive effects in the U.S. market for international services"); *In re Americatel Corp.*, 9 FCC Rcd. 3993, 4001 (1994) ("[W]e find that current market conditions in Chile, Chile's regulatory regime, and the regulatory safeguards we impose as a conditions of this authorization are sufficient to prevent ATA from obtaining an unfair competitive advantage or any undue preferential treatment as a result of its affiliation with ENTEL-Chile. We conclude that entry by ENTEL-Chile will not present a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.")

The Commission also declared, "We do not believe that effective competition will occur if foreign carriers that continue to hold market power in foreign markets are allowed unlimited access to the U.S. market."³ The Commission did not assume static monopolies abroad, but recognized that "[f]oreign domestic markets are . . . undergoing critical transformations with increasing privatization and liberalization."⁴ The 1995 Order nevertheless observed that "sets of preconditions for effective competition in this changing environment" are needed, and determined that "effective competition requires regulation that precludes undue discriminatory and exclusionary behavior."⁵ For these reasons, the Commission expressly rejected the position, advanced by two foreign carriers, that post-entry "safeguards alone are adequate."⁶

The Commission continues to state (NPRM ¶ 26) that one of its goals "is to prevent anticompetitive conduct in the provision of international services or facilities." Yet, nothing has happened to change the Commission's obligation to assess the competitive effects of a service offering involving a U.S. carrier and its affiliate who dominates a foreign market. The Commission's NPRM does not repudiate any of the conclusions reached in the 1995 *Foreign Carrier Entry Order*, i.e., the potential of dominant foreign carriers to abuse their monopolies, that such abuse is against the public interest, and that post-entry safeguards were insufficient to curb these risks to

³ *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3875.

⁴ *Id.* at 3878-79.

⁵ *Id.* at 3879 (emphasis added).

⁶ *Id.* at 3885.

competition. To the contrary, the NPRM affirmatively endorses the ECO analysis for applications from non-WTO Member affiliates.

In the face of this long-standing precedent, the Commission offers only one substantive reason for departing from existing standards and adopting a pro-authorization presumption: "the WTO commitments made by 68 other governments will, when fulfilled, substantially achieve the paramount goal of our Foreign Carrier Entry Order, promoting effective competition in the U.S. international services market." NPRM, ¶ 29 (emphasis added). Thus, implicit in the Commission's Notice is the recognition that the competitive dangers that the Commission has previously recognized will continue to exist until the WTO commitments are fully and adequately fulfilled. Many WTO commitments, however, will take substantial time to implement. The possibility of a diminished risk of anticompetitive conduct in the future is insufficient to justify a change in the rules that would permit entry today by affiliates from countries that have not yet fulfilled those commitments.

Similarly, in the Telecommunications Act of 1996, Congress recognized that effective regulation requires evaluation of practical evidence of competition, not just paper commitments. Bell Operating Companies that wish to offer long distance service from their dominant market are required to seek pre-entry approval from the Commission. *See* 47 U.S.C. § 271. The Act mandates that the Commission conduct a pre-entry approval process including a detailed analysis of whether the BOC's market is open to competition. *Id.* at § 271(c).

2. The Commission Should Not Relax Standards and Establish a Pro-Authorization Presumption Based on Commitments Not Meeting ECO Requirements.

The Commission predicts that the commitments made by the governments of monopoly foreign carriers to liberalize markets in the future "should provide a meaningful check on their exercise of market power" and that "most foreign carriers with monopoly positions today should have far less market power as a result of the WTO commitments." NPRM ¶ 31 (emphasis added). In addition, the Commission "believe[s] that the WTO commitments will soon result in a dramatically changed global competitive environment in which almost all of the major traffic routes will be open to competition." *Id.* at ¶ 33 (emphasis added). However, not more than a small proportion of WTO Member countries will be sufficiently open in the near future under the standards established in the *Foreign Carrier Entry Order* as necessary to limit anticompetitive conduct by foreign carriers with market power.

The ECO test examines whether a carrier controlling bottleneck facilities at the foreign end of an U.S. international route is subject to effective competition in that foreign market.⁷ As the Commission has found, the criteria of the ECO test -- the legal

⁷ The ECO test currently applies to Section 214 and 310(b)(4) public interest analysis of applications by foreign carriers to provide international facilities-based services, switched resale services or non-interconnected private line resale services on routes from the U.S. to any country in which the foreign carrier controls bottleneck facilities, or otherwise possesses market power. *Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd. 3873, 3875-76, 3881, 3928, 3944-45 (1995) (Report and Order) ("*Foreign Carrier Entry Order*"). The Commission has recently decided to apply "an analysis similar to an effective competitive opportunities analysis" to submarine cable landing license applications. *Telefonica Larga Distancia De Puerto Rico, Inc.*, File Nos. ITC-92-116-AL, SCL-93-001, ITC-93-029, Memorandum

right to offer the relevant service; the existence of reasonable and non-discriminatory charges, terms and conditions for interconnection; adequate safeguards against anticompetitive conduct; and an independent regulatory framework -- are necessary to limit the leveraging of foreign market power into the U.S. market.⁸ Accordingly, the criteria of the ECO test are those on which the Commission should assess the adequacy of the market-opening commitments of WTO Member countries in preventing the leveraging of foreign market power.⁹

When each WTO Member country's commitments on basic telecommunications are compared with the requirements of the ECO test, it is evident that competitive conditions sufficient to prevent the leveraging of foreign market power will in 1998 exist in many fewer countries than the 68 referenced by the NPRM (§ 1) as allowing entry in "basic telecommunications services," and in fewer even than the 52 countries the NPRM cites (§ 35) as having allowed competition in international services.

As shown in Attachment 1, only 20 countries, which account for just 33 percent of U.S.-billed IMTS revenues, would meet the requirements of the ECO test on January 1, 1998 on the basis of their WTO commitments. These are the only countries

(footnote continued from previous page)

Opinion and Order, (released May 2, 1997), ¶¶ 2, 27 (denying applications by the U.S. affiliate of Spain's monopoly carrier to acquire ownership interests in COLUMBUS II cable system and Section 214 authority to provide service to Spain).

⁸ *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3880, 3886.

⁹ As described in Section II below, the requirements of the ECO analysis should be modified to focus on the extent to which the ability of the applicant to engage in discrimination through use of its market power is limited by competitive conditions.

committing to provide market access for the provision of international facilities-based voice services,¹⁰ to allow non-nationals to hold controlling interests in facilities-based carriers,¹¹ and to provide reasonable and non-discriminatory charges, terms and conditions for interconnection, safeguards against anticompetitive behavior and independent regulatory procedures.¹² Taking account of the additional countries committing to open their markets on a delayed basis, 25 countries would meet ECO requirements by 2000, and 39 countries would do so in total by the time all WTO commitments are effective in 2013.¹³

¹⁰ The first requirement of the ECO test is "whether U.S. carriers are permitted, as a matter of law, to offer international facilities-based services in the destination foreign country." *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3891.

¹¹ The *Foreign Carrier Entry Order* emphasizes the importance of "the legal right to obtain a controlling interest in a facilities-based carrier." *Id.* at 3981. Without this right, "the incumbent foreign carrier will have the ability to leverage economic power into the U.S. international services market. Absent the ability to obtain such an interest in a competitive enterprise, U.S. carriers cannot obtain a degree of bargaining power sufficient to constrain anticompetitive behavior by the incumbent, or respond effectively to competitive inroads made by the incumbent as a result of its unique ability to operate on an end-to-end basis." *Id.* at 3891-92.

¹² These are the second, third and fourth factors of the ECO test. *Id.* at 3892-94. These requirements are included in the regulatory principles set forth in the WTO Reference Paper, which has been accepted in whole or in part by 65 WTO Member countries.

¹³ Significantly, many of the WTO Member countries to which the U.S. makes the largest settlements outpayments have made commitments falling short of ECO standards or no commitments at all. The 50 countries to which the U.S. made the largest settlements payments in 1995 include 45 WTO Member countries, of which nine made no commitments in the recent negotiations, nineteen made commitments below ECO standards, and another four committed only to delayed market-opening. See *International Settlement Rates*, IB Docket No. 96-261, Notice of Proposed Rulemaking, (released Dec. 19, 1997), FCC 96-484 ("*Benchmark Settlement Rate NPRM*"), Appendix B (Top 50 U.S. Net Settlement Payments in 1995).

Similarly, the extent to which WTO Member countries' commitments will protect against 'one-way resale' should be assessed under the similar criteria applied under the Commission's equivalency test.¹⁴ The purpose of this safeguard is to ensure that "U.S. entities, faced with the diversion of inbound traffic to resellers, would have a reasonable opportunity to respond to that diversion by entering the resale market and diverting outbound traffic."¹⁵ The NPRM (§ 50) cites 52 countries as allowing U.S. carriers to send U.S.-outbound switched traffic over private lines, but Attachment 2 demonstrates that only the WTO commitments of 25 countries meet this and the additional requirements of the equivalency test on January 1, 1998.¹⁶

¹⁴ The equivalency test governs the provision of switched services over international private lines and employs a similar market analysis to the ECO test. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3925 (conforming equivalency and ECO criteria).

¹⁵ *fONOROLA Corp.*, 9 FCC Rcd. 4066, 4068 (1994) (Order on Reconsideration)

¹⁶ The equivalency test requires that the foreign country must provide the legal right to sell international private lines interconnected at both ends for the provision of switched services, and meet the same regulatory criteria required under the second, third and fourth criteria of the ECO test. *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3925. The requirements of the equivalency test must be in existence before an authorization may be granted. See e.g., *Cherry Communications, Inc.*, File No. ITC-96-183, Memorandum Opinion and Order, (released Mar. 31, 1997), ¶ 8.

Even taking account of the nineteen additional countries have made WTO commitments meeting equivalency requirements to open their markets on a delayed basis, only 43 countries would do so in total by the time all commitments are effective in 2013.

3. There is Also no Basis on Which to Relax Standards for Those Nations That Have Refused to Commit to Granting Access to their International Services Markets.

The Commission properly concludes that carriers from non-WTO Member countries -- who, by definition, have not made WTO commitments to open market entry -- should continue to be subject to the ECO test to prevent competitive harm in the U.S. market, but the NPRM unjustifiably concludes similar measures are not necessary for WTO Members that have made no or deficient commitments. There is no sufficient reason to distinguish between the nations who could have made full commitments but refused and those countries who did not commit because they are not Members of the WTO.

The Commission justifies treating non-committing Member countries with the same new "open entry" approach on the grounds that there is a "likelihood of liberalization" in these markets, despite their governments' refusal to commit at this time, and that when and if they liberalize their markets, the WTO obliges them to not discriminate against U.S. carriers. NPRM, ¶¶ 36-37. Yet, the expectation that these countries will liberalize their markets is speculative -- and not a sufficient basis for changing the Commission's rules. These countries all recently resisted the opportunity to make such commitments in the WTO negotiations. Moreover, WTO Member countries that have not opened their international services markets now have a lesser incentive to do so -- particularly if the Commission does not adopt effective remedies against competitive

harm from these 'free-rider' countries.¹⁷ Even the Commission acknowledges that "[f]or carriers from [the non-committing] countries, the WTO Basic Telecom Agreement will be less effective in preventing anticompetitive conduct." *Id.* at ¶ 35.

II. THE WTO AGREEMENTS ALLOW THE COMMISSION TO PROMOTE COMPETITION BY DENYING LICENSES WHERE NECESSARY AND REQUIRE NEITHER A SHOWING OF "A VERY HIGH RISK" OF HARM NOR PRESUMPTIONS IN FAVOR OF ENTRY OR ACCOUNTING RATE FLEXIBILITY.

The NPRM (¶ 37) states that "applying the same rules to all WTO Members would be most consistent with U.S. international trade obligations under the GATS." Indeed, a significant motivating force behind the NPRM is apparently the desire to remove any market entry limitation that anyone could assert to be inconsistent with the requirements of a multilateral trade regime following the WTO agreement on basic telecommunications. But the NPRM does not explain any such concern, or specify how it may have influenced the proposed changes in Commission rules and practices. Moreover, the U.S. practice has been not to make sweeping changes in U.S. regulatory rules in response to new trade agreements unless it has been clear that those agreements have strictly required them.

Such caution is particularly desirable here. The inclusion of basic international telecommunications services under the WTO General Agreement on Trade in

¹⁷ As the Coalition for Hemispheric Competitiveness emphasized in its Comments in response to the *Benchmark Settlement Rate NPRM*, if carriers from closed markets are now able to use their above-cost settlement rates to subsidize their activities in open markets and to engage in the one-way by-pass of accounting rates, they will have little incentive to make WTO commitments that would limit their future

Services ("GATS") involves the extension of multilateral trade disciplines to services supplied through bilateral intercarrier relationships providing unique opportunities for the leveraging of domestic market power, raising trade and competition issues not previously considered in the WTO. Further, the relevant multilateral agreement, the GATS, was adopted only three years ago and has so far been subject to just one WTO dispute resolution procedure decision that did not involve telecommunications.

In the past, both the Commission and the Department of Justice have found that entry limitations are necessary on purely competitive grounds to prevent anticompetitive behavior by carriers with market power in closed foreign markets. The NPRM thus properly proposes (§§ 32, 39-40) to limit market entry by carriers with market power where the resulting harm to competition cannot be addressed by any less burdensome safeguard, and the Commission would be entirely within U.S. rights under the WTO in taking such action. A necessary part of that analysis, as the Commission recognizes in its proposed approach to flexible accounting rate arrangements, is whether there is sufficient competition in the foreign market to limit the potential abuse of foreign market power in the U.S.

Similarly, the Commission would be well within U.S. rights under the WTO in retaining a lower threshold of harm, such as the "risk of substantial harm to competition" standard it presently requires. The Commission also is not precluded from

(footnote continued from previous page)

monopoly profits from such practices. *Benchmark Settlement Rate NPRM*, Comments of the Coalition of Hemispheric Competitiveness (filed Feb. 7, 1997), at 6-7.